SUPREME COURT, U. S.

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Nos. 1255, 1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

SPARTAN'S INDUSTRIES, INC., ET AL., *Appellants*,

v.

THE STATE OF TEXAS, *Appellee*.

SUNDACO, INC., ET AL., *Appellants*,

v.

THE STATE OF TEXAS, ET AL., *Appellees*.

ON APPEALS FROM THE SUPREME COURT OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

WILLIAM H. ALLEN
888 Sixteenth Street, N. W.
Washington, D. C. 20006
Attorney for Appellants

Of Counsel:
COVINGTON & BURLING

April 1970

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OCTOBER TERM, 1969

No. 1255

SPARTAN'S INDUSTRIES, INC., ET AL., *Appellants*,

v.

THE STATE OF TEXAS, *Appellee*.

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v.

THE STATE OF TEXAS, ET AL., *Appellees*.

ON APPEALS FROM THE SUPREME COURT OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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I.

On the questions whether, because of its arbitrariness, Article 286(a) of the Texas Penal Code deprives appellants of liberty or property without due process of law or denies them the equal protection of the laws the State of Texas in its nearly identical motions in

these two cases asserts chiefly that a state may provide for a one day surcease from commerce as well as a common day of rest and that on this view the cases are governed by *McGowan* v. *Maryland*, 366 U.S. 420 (1961), and the other Sunday closing law cases of the 1960 Term. The Jurisdictional Statement in No. 1255, relied upon in No. 1271, makes clear that it is only because Sunday closing laws provide for a common day of rest that they have been sustained by this Court and state appellate courts and that, in any event, Article 286(a) does not necessarily result in even a one day respite from business. We do not believe that anything said by the appellants detracts from the showing thus made that the due process and equal protection questions are substantial.

II

On the question whether Article 286(a) is too vague to stand as a criminal statute, the state adduces as dispositive authorities three per curiam decisions of this Court disposing of appeals on the preliminary papers (along with *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1966), in which, as we noted in the Jurisdictional Statement in No. 1255, p. 18, no issue of vagueness was raised). Those authorities are not dispositive.

The first case cited by Texas is *Arlan's Dep't Store* v. *Commonwealth*, 369 S.W.2d 9 (Ky. 1963), *appeal dismissed per curiam*, 376 U.S. 186 (1964). In that case the question ruled upon by the state court and presented to this Court was whether a Sunday closing statute was void for vagueness because of its exception for any "work of necessity." This Court ruled that no substantial federal question was presented. How-

ever one may view that ruling, it does not conclude the very different question presented here whether a statute listing 46 categories of goods that cannot be sold on consecutive Saturdays and Sundays is void for vagueness because of the generality and ambiguity of some of the terms used in the list.

The second case is *State* v. *Solomon*, 245 S.C. 550, 141 S.E.2d. 818 (1965), *appeal dismissed per curiam*, 382 U.S. 204 (1965). There, questions as to the vagueness of South Carolina's Sunday laws were raised in the state court, but in this Court none of the questions presented related to vagueness. See Jurisdictional Statement, No. 588, O.T. 1965, pp. 2-3* This Court therefore could not have decided any vagueness question.

Finally, Texas cites *Whitney Stores, Inc.* v. *Summerford*, 280 F.Supp. 406 (D.S.C. 1968), *aff'd per curiam*, 393 U.S. 9 (1968). It is clear that the vagueness contention in that case did not relate to any provision comparable to the list of categories of items in Article 286(a). The claim was that the terms "work of necessity" and "novelties and souvenirs," which were among exceptions to the Sunday closing requirement of South Carolina law, rendered that law unconstitutionally vague. *Id.* at 410-11.

In short, the question whether Article 286(a) goes beyond constitutional limits in the vague way in which it describes what merchants may sell on consecutive

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* The only question argued in the jurisdictional statement was whether a Sunday law violated the free exercise of religion guarantee in its application to an orthodox Jew. Appellant reserved the right to argue two additional constitutional questions if probable jurisdiction was noted; neither of these related to vagueness.

Saturdays and Sundays is not directly answered by any decision of this Court. That question and the broader questions whether Article 286(a) and its scheme of classification are rationally related to any legitimate legislative purpose are substantial questions that warrant a hearing before this Court.

Respectfully submitted,

WILLIAM H. ALLEN
888 Sixteenth Street, N. W.
Washington, D. C. 20006
Attorney for Appellants

Of Counsel:

COVINGTON & BURLING

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